

(b)(6)



U.S. Citizenship  
and Immigration  
Services

DATE: **SEP 17 2014**

OFFICE: TEXAS SERVICE CENTER

FILE: [REDACTED]

IN RE:

Petitioner: [REDACTED]

Beneficiary: [REDACTED]

PETITION: Immigrant Petition for Alien Worker as a Skilled Worker or Professional Pursuant to Section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:

[REDACTED]

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office (AAO) in your case.

This is a non-precedent decision. The AAO does not announce new constructions of law nor establish agency policy through non-precedent decisions. If you believe the AAO incorrectly applied current law or policy to your case or if you seek to present new facts for consideration, you may file a motion to reconsider or a motion to reopen, respectively. Any motion must be filed on a Notice of Appeal or Motion (Form I-290B) within 33 days of the date of this decision. **Please review the Form I-290B instructions at <http://www.uscis.gov/forms> for the latest information on fee, filing location, and other requirements.** See also 8 C.F.R. § 103.5. **Do not file a motion directly with the AAO.**

Thank you,

  
Ron Rosenberg

Chief, Administrative Appeals Office

**DISCUSSION:** The preference visa petition was initially approved by the Director, Texas Service Center (the director). Upon further review, the director served the petitioner with a Notice of Intent to Revoke (NOIR) the approval of the Form I-140 (Immigrant Petition for Alien Worker). The director ultimately served the petitioner with a Notice of Revocation (NOR) with a finding of fraud or misrepresentation. The director also dismissed the petitioner's motion to reopen. The Administrative Appeals Office (AAO) dismissed a subsequent appeal, concurring with the finding of misrepresentation. The matter is now before the AAO on the petitioner's motion to reopen and reconsider. The petitioner's motion will be granted as a motion for reconsideration; the AAO's June 3, 2013 dismissal of the appeal is affirmed but is amended herein to withdraw the finding of fraud or misrepresentation.

The petitioner is a restaurant. It seeks to employ the beneficiary permanently in the United States as a "head cook."<sup>1</sup> The petitioner requests classification of the beneficiary as a professional or skilled worker pursuant to section 203(b)(3)(A) of the Immigration and Naturalization Act (the Act), 8 U.S.C. § 1153(b)(3)(A). As required by statute, an ETA Form 9089, Application for Permanent Employment Certification approved by the Department of Labor (DOL), accompanied the petition. The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is October 31, 2006. *See* 8 C.F.R. § 204.5(d).

As stated on the labor certification, the certified position of head cook does not require any formal education or training. Twenty-four months (2 years) of experience in the job offered of head cook is required. The employer will not accept experience in an alternate occupation.

The director's decision revoking the petition concludes that the petitioner and beneficiary willfully misrepresented material facts and that the beneficiary did not possess the minimum 24 months of experience required to perform the offered position by the priority date. The director's NOIR notified the petitioner that the documents submitted to the record by the beneficiary contradicted the employment experience claimed on the ETA Form 9089.<sup>2</sup> The director revoked the petition's

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<sup>1</sup> The job duties of the position are stated in H.11 of the ETA Form 9089:

Prepare, season and cook Pizza, sandwiches, French fries and sauces. Inspect supplies, equipment, and work areas in order to ensure sanitation, and safety procedures.

<sup>2</sup> The procedural history in this case is documented by the record and incorporated. Further elaboration of the procedural history will be made only as necessary.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States. Section 203(b)(3)(A)(ii) of the Act, 8 U.S.C. § 1153(b)(3)(A)(ii), grants preference classification to qualified immigrants who hold baccalaureate degrees and are members of the professions.

The petitioner must establish that its job offer to the beneficiary is a realistic one. Because the filing of an ETA Form 9089 labor certification application establishes a priority date for any immigrant petition later based on the ETA Form 9089, the petitioner must establish that the job offer was realistic as of the priority date and that the offer remained realistic for each

approval with a finding of fraud and invalidated the labor certification. The director also dismissed the petitioner's motion to reopen on March 7, 2012.

We dismissed the petitioner's appeal on June 13, 2013. The petitioner, through counsel has filed a motion to reopen and to reconsider our previous decision. Counsel reasserts the contention that any perceived misrepresentation regarding the beneficiary's employment with the petitioner and with a previous employer is not material to the case and cannot form the basis to revoke the petition's approval.

A motion to reopen must state the new facts to be proved in the reopened proceeding and be supported by affidavits or other documentary evidence. 8 C.F.R. § 103.5(a)(2). A motion to reconsider must state the reasons for reconsideration and be supported by any pertinent precedent decisions to establish that the decision was based on an incorrect application of law or United States Citizenship and Immigration Services (USCIS) policy. 8 C.F.R. § 103.5(a)(3). A motion that does not meet applicable requirements shall be dismissed. 8 C.F.R. § 103.5(a)(4). As no new facts are stated to be proved in the proceeding, counsel's motion will be accepted as a motion to reconsider.

The record indicates that Part K of the ETA Form 9089 was signed under penalty of perjury by the petitioner's owner on March 1, 2007 and by the beneficiary on February 26, 2007.<sup>3</sup> It lists two prior jobs held by the beneficiary:

1. [REDACTED] as a full-time Pizza Cook from February 1, 1999 to September 30, 2002; the job details listed were:  
Prepare, season and cook Pizza, sandwiches, French fries and sauces.
2. [REDACTED] as a full-time Cook from February 1, 1995 to May 31, 1998; the job details listed were:  
Cooked all the main meals at the resyaurnat [sic] and for hotel guests. Provided a wide variety of foods, lunches and dinners. Prepared recipes and desserts from experienced and personal knowledge. Estimated food consumption, ordered supplied in a timely fashion.

The beneficiary did not claim to be a current employee of the petitioner or to have ever worked for the petitioner. However, other evidence contradicts the information submitted on the ETA Form 9089 including a Form G-325A, signed by the beneficiary on August 9, 2007 and a copy of a previously signed Form ETA 750 labor certification signed by the beneficiary on March 26, 2001. On the Form G-325A, the beneficiary states that he worked as a head cook for the petitioner from June 2003 to the present (date of signing, August 9, 2007). On the Form ETA 750, he states that he

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year thereafter, until the beneficiary obtains lawful permanent residence. The beneficiary's qualifications for the job and the petitioner's ability to pay the proffered wage are essential elements in evaluating whether a job offer is realistic. See *Matter of Great Wall*, 16 I&N Dec. 142 (Acting Reg'l Comm'r 1977); see also 8 C.F.R. § 204.5(g)(2).

<sup>3</sup> As noted in our June 3, 2013 decision, the ETA Form 9089 fails to include the preparer's signature in Section M. This deficiency has not been remedied on motion.

was either unemployed or self-employed from July 1998 to March 2001. In order to ascertain the facts, USCIS contacted the petitioner's president in June 2010, who stated that the beneficiary had been working for the petitioning business for over six years, thus prior to 2006 when the ETA Form 9089 was signed. It is noted that the answer to question J.23 on the ETA Form 9089, "Is the alien currently employed by the petitioning employer?" was answered "no."

Other inconsistencies in the record include:

1. Publicly available records show that the business name was spelled [REDACTED] not [REDACTED]. Both the ETA Form 9089 and G-325A forms where the information was supplied by the beneficiary, the employer's name is incorrectly spelled as [REDACTED].
2. The director had questioned the beneficiary's claims that he was working at [REDACTED] [sic] and at the petitioning business between June 2002 and September 2002 when both jobs were full-time positions. Also questioned was the beneficiary's claim to have been self-employed and employed by [REDACTED] [sic] from February 2000 through March 2001.
3. USCIS contacted the owner of [REDACTED]. He confirmed via telephone that the beneficiary had never worked for him and that he had never filed a labor certification on his behalf. Mr. [REDACTED] was also asked if he ever signed his name [REDACTED] as it was written on the ETA 750 and he responded that he did not sign his name in this way.

Subsequently, the petitioner submitted an affidavit from Mr. [REDACTED] dated February 10, 2011, recanting what he had stated to the USCIS officer in the prior contact. Instead, Mr. [REDACTED] states that he had misspoken because he referred to the beneficiary by his middle name during the time that the beneficiary had worked for him.

As noted by the director, if Mr. [REDACTED] employed the beneficiary for over three years and filed a labor certification for him, he would have known his name. As we stated in our previous decision, the petitioner also failed to explain why Mr. [REDACTED] signed his name [REDACTED] on the affidavit. We found that these discrepancies and doubts were never resolved by the petitioner. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *See Matter of Ho*, 19 I&N Dec. 582, 591 (BIA 1988). In view of this, we affirmed the director's finding and concluded that the letter from [REDACTED] was not sufficient to establish that the beneficiary had the required two years of experience in the job offered as a head cook.

Further, as indicated above, Part K of the ETA Form 9089 (signed by the beneficiary) states that the beneficiary worked as a cook for the [REDACTED] from February 1, 1995 to May 31, 1998. We note that the previous Form ETA 750 labor certification also claimed that the beneficiary was a cook for this establishment. Neither claimed that the beneficiary was a "head cook" which is the required experience for the instant position as stated on the labor certification. However, in support of this

employment, the petitioner submitted a copy of a letter dated February 14, 2002, from the [REDACTED] signed by [REDACTED], as proprietor, which states that the beneficiary was a "head cook," not just a cook as claimed by the beneficiary in the two previous labor certifications. The letter from [REDACTED] describes the beneficiary's duties as, "[P]repare, season and cook Pizza, Sandwiches, French Fries and sauces." This language is identical to that described on the ETA Form 9089 for the job at [REDACTED] and the duties of the proffered position. The language is different from the description of the beneficiary's duties with [REDACTED] as listed on the ETA Form 9089 and Form ETA 750. These differences raise a question of authenticity.<sup>4</sup> These inconsistencies were never resolved. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *See Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988). We note that the record contains no other corroborative evidence of this employment. *See Matter of Y-B-*, 21 I&N Dec. 1136, 1139 (BIA 1998)(holding that weaker the written or oral testimony is concerning memories, events, or experience, the greater the need is for corroborative evidence). With any further filings, the petitioner must submit independent and objective evidence of the beneficiary's employment with [REDACTED] to resolve these inconsistencies and doubts.

Having reviewed and reconsidered the record, including evidence submitted on appeal and motion, in view of the discrepancies therein related to the beneficiary's claimed experience, we find that the petitioner failed to demonstrate that the beneficiary meets all of the requirements of the offered position as of the priority date. However, although still unresolved, we find that the discrepancies regarding the claimed experience do not rise to the level of fraud or willful misrepresentation. Therefore, the finding of fraud or misrepresentation will be withdrawn and the labor certification will be reinstated.

Further, in view of the foregoing, we reaffirm our determination that the director properly revoked the approval of the petition. Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

In *Matter of Esteime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and un rebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Attorney General [now Secretary,

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<sup>4</sup>The letter also claims that the beneficiary's "skills and art of cooking Nepali and Indian food are appreciable," but does not describe any duties that involve cooking Nepali and Indian food.

Department of Homeland Security], may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204.” The realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Matter of Ho*, 19 I&N Dec. 582, 590 (BIA 1988). In the instant case, the director’s revocation of the approved immigrant petition was warranted and is affirmed, as the petition was approved in error where the petitioner had not demonstrated that the beneficiary met the requirements of the offered position as of the priority date.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

**ORDER:** The motion to reconsider is approved. The AAO’s decision of June 3, 2013 is affirmed as amended herein.

**FURTHER ORDERED:** The labor certification, [REDACTED] is reinstated.